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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 139.

THE PEOPLE OF THE STATE OF NEW YORK
upon the relation of RICHARD REID ROGERS,
APPELLANT,
AGAINST
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,
APPELLEES.

APPEAL FROM THE SUPREME COURT, ALBANY COUNTY, STATE OF NEW YORK.

BRIEF FOR APPELLEES.

JOHN J. BENNETT, JR.,
Attorney-General,
Attorney for Appellees.

JOSEPH M. MESNIG,
Assistant Attorney-General,
HENRY EPSTEIN,
Solicitor General,
Counsel for Appellees.

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MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

APPELLEES.

BRIEF FOR APPELLEES.

Statement.

This cause comes to this Honorable Court, on appeal from a final order and judgment of the Supreme Court of the State of New York, pursuant to the provisions of Section 237-a of the Judicial Code, as amended. The final order and judgment appealed from (R. 63) was duly entered on May 2, 1936, in the office of the Clerk of Albany County, upon the remittitur of the Court of Appeals (R. 61) bearing date April 29, 1936.

The questions presented are (1) the jurisdiction of the Court and (2) whether or not the Panama Rail

Road Company is engaged in the conduct of a usual governmental function for the Federal government, so as to render immune from State taxation the salaries of its officers and employees.

Official Report of Opinions Below.

The opinion of Mr. Justice Heffernan, writing for the Appellate Division of the Supreme Court, Third Judicial Department, is reported in 245 App. Div. 452 (R. 48-58). No opinion was written by the Court of Appeals (R. 63). The memorandum decision of the Court of Appeals is reported in 271 N. Y. (mem.) 39.

Statement of Facts.

Appellant, a New York resident, was employed by the Panama Rail Road Company as general counsel at an annnual salary of $15,000. In filing his New York State income tax returns for the calendar years 1927, 1928 and 1929, he acknowledged receipt of this income, but did not include it as part of his gross income for tax purposes. Additional assessments of tax computed thereon were made by appellees (R. 14-15).

The Panama Rail Road Company is a New York corporation (Ch. 284, Laws of 1849) whose entire capital stock has been acquired by the United States (R. 24-25). The company conducts a general transportation business and has its principal office in the City of New York (R. 17). At New York City it has about one hundred office employees, in addition to dock engineers, cargo checkers, freight clerks and passenger agents (R. 18). It operates a line of steamships be-

tween New York and the Canal Zone (R. 19-20), carrying passengers and freight. Its steamers have also operated to Haiti and South America (R. 17-18). The ships engaged in commercial business and the company's tariffs correspond to those of competing private carriers (R. 21). It carries government freight and employees at reduced rates (R. 20).

The company also operates a railroad across the Isthmus of Panama, a commissary establishment, a dairy and two hotels (R. 25).

The company is managed by a board of thirteen directors, each of whom holds one share of stock (R. 25). The directors are elected by the Secretary of War in his capacity as stockholder of record of 69,987 shares (R. 22-23). The capital stock consists of 70,000 shares of the par value of $100. (Ch. 364, Laws of 1855.)

The company has been operating at a profit and has been paying dividends (R. 20). Its officers and employees are paid directly by the company from moneys derived from the company's operations (R. 21). No liability rests upon the United States because of any claims for damages which might lie against the company (R. 22).

Summary of Argument.

I. The record does not show that a substantial Federal question was expressly or necessarily decided by the State Court.

II. The Panama Rail Road Company is not an instrumentality of the United States engaged in

the conduct of a usual or traditional governmental function.

A. Immunity from taxation extends only to agencies and instrumentalities engaged in usual or traditional governmental functions.

B. The functions of the Panama Rail Road Company are not traditionally or usually governmental but are commercial and proprietary.

III. Conclusion—

The Position of the State of New York.

ARGUMENT.

I.

The record does not show that a substantial Federal question was expressly or necessarily decided by the State Court.

The decision of the Appellate Division of the Supreme Court, Third Department, undoubtedly rested upon a consideration of the constitutional immunity from State taxation of agencies or instrumentalities of the Federal government engaged in the conduct of usual or traditional governmental functions. But the affirmance of the Court of Appeals was without opinion and, while we may surmise that its decision was based upon the same ground, we are left to conjecture as to the actual basis of its decision.

Lynch v. New York ex rel. Pierson, 293 U. S. 52.

In the State courts, the question was raised whether appellant actually was an officer or employee of the Panama Rail Road Company, or merely an independent contractor since the record was completely silent with respect to such matters as tenure of office, the mode and manner of his appointment, what other professional activities he conducted, whether he engaged in the general practice of law in addition to his duties for the Company or the degree of control over his activities exercised by the company. Were appellant properly held to be an independent contractor rather than an officer or employee of the company, it is so well settled that his compensation would, beyond any doubt, be subject to a State income tax that, in such circumstances, we believe no substantial Federal question would be here presented.

Burnet v. McDonough, 46 Fed. (2nd) 944;
Commissioner v. Modjeski, 75 Fed. (2nd) 468, cert. denied 295 U. S. 764;
Pease v. Commissioner, 83 Fed. (2nd) 122;
Metcalf & Eddy v. Mitchell, 269 U. S. 514;
Lucas v. Reed, 281 U. S. 699.

For jurisdiction to exist in this Court, it must appear affirmatively, not only that a substantial Federal question was presented, but that the decision of such a Federal question was necessary to a determination of the cause, that such Federal question actually was decided, or that the judgment as rendered could not have been given without deciding it.

Judicial Code, §237 (a);
28 U. S. C. A. §344 (a); 45 Stat. 54;
28 U. S. C. A. §861 (a).
Williams v. Oliver, 53 U. S. 111, 124;
Whitney v. California, 274 U. S. 357, 360.

It is true, as appellant says in his brief, that we urged a determination upon the main question in the courts below and we join with appellant in urging such a determination here. But we would feel remiss were we to fail in calling the attention of the Court to what we believe to be a deficiency in the record.

II.

The Panama Railroad Company is not an instrumentality of the United States engaged in the conduct of a usual or traditional governmental function.

A. Immunity from taxation extends only to agencies and instrumentalities engaged in usual or traditional governmental functions.

Section 359-f of the Tax Law provides for an exemption from the application of the New York Personal Income Tax (Art. 16, Tax Law) in the case of salaries, wages and other compensation paid by the United States to its officers and employees. Appellant, contending for the income tax exemption of his salary, has not invoked this statutory exemption, but rests his claim upon the fundamental, constitutional doctrine that the governmental instrumentalities and agencies of the Federal government and the various state governments are mutually immune from taxation by the other.

The doctrine is thoroughly imbedded in our jurisprudence that a state is without power to tax the property of the governmental agencies or instrumentalities

of the United States. Similarly, the Federal government lacks power to tax State property or agencies.

In *Van Brocklin v. Tennessee*, 117 U. S. 151, at p. 178, Mr. Justice Gray said:

> "The reasons for exempting all the property and income of a State, or of a municipal corporation, which is a political division of the State, from federal taxation, equally require the exemption of all the property and income of the national government from State taxation."

See also:

McCulloch v. Maryland, 4 Wheat. 436;
Collector v. Day, 11 Wall. 113.

Thus, in *Railroad Company v. Peniston*, 18 Wall. 5, Mr. Justice Strong said, at p. 30:

> "There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National government is legitimately exercised within the States. While it is true *that* government cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government. The Constitution contemplates that none of those powers may be restrained by State legislation. But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General government, or interfere with its operations to such an extent, or in such a manner, as to render it unwar-

> ranted. *It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution.* To hold that would be to deny to the States all power to tax persons or property." (Italics ours.)

And in the same case (p. 36) this Court said:

> "It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, *or upon the fact that they are agents,* but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power." (Italics ours.)

It was held in this case that a State tax upon the property of the Union Pacific Railroad Company, as distinguished from a tax on its franchises, did not deprive the railroad of its power to serve the government as it was intended to serve it, or hinder the efficient exercise of its power. (Its franchise had been granted by Congress.)

Concerning State taxation of franchises granted by the Federal government, compare *Fox Film Corp. v. Doyal,* 286 U. S. 123, where this Court reversed earlier decisions holding patents and copyrights immune from State taxation.

In that case Mr. Chief Justice Hughes said (p. 128):

> "The principle of the immunity from State taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential

to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government *(McCulloch v. Maryland*, 4 Wheat. 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.' *Indian Motorcycle Co. v. United States,* 283 U. S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon an 'entire absence of power' *(Johnson v. Maryland,* 254 U. S. 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government'. *Wilcuts v. Bunn,* 282 U. S. 216, 225."

In *South Carolina v. United States*, 199 U. S. 437, it was held that the exemption of State agencies and instrumentalities from Federal taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business.

Thus, Mr. Justice Brewer said (p. 463):

"Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing exercises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages *in a business which is of a private nature* that business is not withdrawn from the taxing power of the Nation." (Italics ours.)

A question very similar to that presented in *South Carolina v. United States, supra,* was decided by this Court in *Ohio v. Helvering,* 292 U. S. 360. The Court reiterated the principle that whenever a state engages in a business of a private nature, it exercises non-governmental functions and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress.

In *Flint v. Stone Tracy,* 220 U. S. 108, at page 172, Mr. Justice Day said:

> "It is no part of the essential governmental functions of a state to provide *means of transportation,* supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations and though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred." (Italics ours.)

As was said in *Commissioner v. Modjeski,* 75 Fed. (2nd) 468, *infra,* the *Flint* case is authority for the doctrine that only interference with essentially governmental functions can be unconstitutional.

In the decisions which we have cited thus far, the courts were concerned with the question whether or not the activity sought to be subjected to taxation was the exercise of a governmental function. Where it was found to be such a governmental function, it was held to be immune from taxation, since to permit it to be

taxed would be a restraint upon and an embarrassment of the means of government.

The ever widening activities of government made it inevitable that the question should again be presented to this Court and in 1934 *(Helvering v. Powers,* 293 U. S. 214) there was presented the question whether the compensation of the members of the board of trustees of the Boston Elevated Railway Company was constitutionally exempt from the imposition of the Federal income tax, immunity being claimed upon the ground that the trustees were officers of the Commonwealth of Massachusetts and instrumentalities of its government. It appeared that the railway company encountered financial difficulties and, by act of the Massachusetts Legislature, agreed to by the company, was taken over by the State to be publicly operated and managed for a limited period of time. It was not disputed that the trustees who were to manage the company were officers of the State and that their salaries were fixed by the Legislature, though they were to be paid from the operations of the company. The Supreme Court of Massachusetts had previously been called upon to interpret the act in question and had characterized the operation of the railway by the State as being "undertaken by the Commonwealth, not as a source of profit, but solely for the general welfare".

This Court held that the salaries of the trustees were not constitutionally immune from the imposition of the Federal income tax. Mr. Chief Justice Hughes said, page 223:

> "While the undertaking is for the public benefit, it is still a particular business enterprise—the op-

> eration of a street railway—and the functions of the trustees are limited accordingly. The property remains in private ownership. The Act, accepted by the Company, constitutes in substance an agreement between the Company and the Commonwealth that the latter shall temporarily take over the management and operation and pay specified amounts by way of compensation. While the Commonwealth may be called upon to bear losses that may occur, if the fares as fixed prove to be insufficient, the operation by the trustees is intended to be self-sustaining. The transportation service is to be rendered, as respondents' counsel say, 'under such a flexible system of rate-making as would allow the fixing of fares equal, as nearly as might be, to the cost of service.' The compensation of the trustees is undoubtedly a part of that cost."

And again, speaking of limitations upon immunity from taxation, page 225:

> "And one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend.* The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity." (Italics ours.)

And finally, page 227:

> "We see no reason for putting the operation of a street railway in a different category from the sale of liquors. In each case, the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is *normally within the reach of the federal taxing power and is distinct from the usual governmental functions* that are immune from federal taxation in order to safeguard the necessary independence of the State.

If, in the instant case, the Commonwealth had acquired the property of the Company and had organized management of it in perpetuity by the state government, instead of temporarily, or had taken over all the street railways in all its cities for direct operation by the Commonwealth, there would appear to be no ground, under the principles established by the decisions we have cited, for holding that this would effect the withdrawal of the enterprise from the federal taxing power. And the fact that the State has here undertaken public management and operation for a limited time, and under the particular restrictions of the agreement with the Company, cannot be said to furnish a ground for immunity.

"If the business itself, by reason of its character, is not immune, although undertaken by the State, from a federal excise tax upon its operations, upon what ground can it be said that the compensation of those who conduct the enterprise for the State is exempt from a federal income tax? Their compensation, whether paid out of the returns from the business or otherwise, can have no quality, so far as the federal taxing power is concerned, superior to that of the enterprise in which the compensated service is rendered.

"We conclude that the Congress had the constitutional authority to lay the tax." (Italics ours.)

There followed the decision of the Circuit Court of Appeals, Second Circuit, in *Commissioner v. Modjeski*, 75 Fed. (2nd) 468 (Cert. denied 6/3/35). In this case, Dr. Modjeski, an eminent consulting engineer in the employ of the Delaware River Joint Commission in connection with the construction of a bridge over the Delaware River, sought exemption of his salary from Federal income taxation. The Court, while discussing the question of "essential governmental functions" and "usual governmental functions" based its holding

on a finding that Dr. Modjeski was an independent contractor and, for that reason, subject to taxation. The Court said, page 470:

> "Whether the commission was a governmental agency engaged in the exercise of a *usual governmental function* or merely carrying on the ministerial or proprietary functions for inhabitants of the interested states, we need not decide." (Italics ours.)

The question whether the creation of port facilities, the building of bridges, highways and tunnels were essential or usual governmental functions, which was avoided in the *Modjeski* case, *supra,* was squarely presented and decided by the same Court in *Commissioner v. Ten Eyck,* 76 Fed. (2nd) 515, a case involving the Federal taxation of the salary of the chairman of the Albany Port District Commission. The Court reviewed in detail the creation, the powers and the activities of the Commission. It found that the construction of port and harbor or terminal developments and facilities were, classically and historically, governmental functions, usually conducted by governmental agencies. The Court said:

> "The commission, in the instant case, a public corporation, maintaining and operating a public port, *not for profit,* is performing a usual governmental function, and is not withdrawing sources of revenue from the Federal taxing power. *It has supplanted no private business to which the Federal taxing power would normally extend.* If a private corporation performs public services for a profit, it cannot be said to be exercising governmental functions simply because of that service." (Italics ours.)

The Court reviewed the decisions of this Court in the State liquor dispensary cases, *Ohio v. Helvering,*

supra, and *South Carolina v. United States, supra*, and said:

> "It is the *entrance into a trade enterprise* that distinguishes these cases, relied upon by the petitioner [Commissioner of Internal Revenue]. It cannot be maintained that there is involved in the instant case *a trade or business, entered into for profit, constituting a proprietary enterprise.* Revenues are not profits, but revenues, like tolls collected from users of a State improvement, are merely means by which the State attempts to recoup in some part its legitimate expenses." (Italics ours.)

The Court affirmed the ruling of the United States Board of Tax Appeals that the salary of the Chairman of the Albany Port District Commission was not subject to Federal taxation.

The liability to and immunity from Federal taxation of various state and municipal agencies and instrumentalities were the subject of judicial determination in:

Commissioner v. Sherman, 69 Fed. (2nd) 755;
Commissioner v. Harlan, 80 Fed. (2nd) 660;
Childers v. Commissioner, 80 Fed. (2nd) 27;
Devlin v. Commissioner, 82 Fed. (2nd) 731;
Hoskins v. Commissioner, 84 Fed. (2nd) 627;
Commissioner v. Brush, 85 Fed. (2nd) ..., petition for certiorari pending;
City of Galveston v. United States, 10 Fed. Supp. 810, 822.

In a decision handed down on October 28, 1936, the United States Board of Tax Appeals in *Case v. Commissioner*, 34 B. T. A. ..., reviewed and reversed the

action of the Commissioner of Internal Revenue in assessing an income tax upon the salaries of employees of the Port of New York Authority. Referring to the *Modjeski, Ten Eyck* and *Harlan* cases, the Board remarks that "the Government says that for one reason or another each of those decisions lacks authoritative force to control the general question." Wherein these decisions fall short as authority, we fail to see. The Board reviewed in detail the activities conducted by the Port of New York Authority and concluded:

> "We hold that the Port Authority is engaged in the performance of a sovereign function of each of the states of New York and New Jersey and that the compensation received by its employees is exempt from the Federal income tax."

The decision seems logically to follow the determination in *Commissioner v. Ten Eyck, supra,* since the Port Authority is the instrumentality through which the States of New York and New Jersey function in providing integrated facilities, for the Port of New York such as bridges and tunnels, highway approaches and terminal facilities, all clearly in the exercise of usual governmental functions.

Thus, we submit that it is well settled that the restriction upon the taxing power of the State, with respect to agencies or instrumentalities of the Federal government, applies only to such activities as are usually, classically and traditionally governmental.

This principle was recently reasserted by this Court in *United States v. California,* 297 U. S. 175, in the following language:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on

which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation *traditionally* within it. *Helvering v. Powers*, 293 U. S. 214, 225; *Ohio v. Helvering*, 292 U. S. 360; *South Carolina v. United States*, 199 U. S. 437; see *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 173, explaining *South Carolina v. United States, supra.* Hence we look to the activities in which the states have *traditionally* engaged as marking the boundary of the restriction upon the federal taxing power." (Italics ours.)

We submit, that to be successful in this proceeding, appellant must convince this Court that the Panama Rail Road Company is engaged in the exercise or pursuit of a function not only governmental, but one *usually or traditionally so.*

B. The functions of the Panama Rail Road Company are not traditionally or usually governmental but are commercial and proprietary.

The Panama Rail Road Company is a corporation formed by a special act of the New York Legislature (Ch. 284, Laws of 1849). That act authorized certain named individuals to form a corporation to be known as Panama Rail Road Company, with a capital stock of not to exceed $5,000,000 for the purpose of constructing and operating a railroad across the Isthmus of

Panama under a grant made to three named individuals by the then Republic of New Grenada. As an incidental power it was authorized to own and operate steamships. Six years later it was granted certain additional powers and permitted to increase its capitalization to an amount not to exceed $7,000,000 (Ch. 364, Laws of 1855), its present capitalization.

So far as appears from the record in this case, it was apparently privately owned and operated for some fifty-five years, until the capital stock of the company was acquired by the United States. That its commercial and proprietary character was to be continued is strikingly attested by the communication which President Theodore Roosevelt addressed to the then Secretary of War, dated May 9, 1904. Mr. Roosevelt expressed a desire "that the policy of the road be completely harmonized with the policy of the Government of making it an adjunct to the *construction* of the canal, *at the same time fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama*" (R. 33). (Italics ours.)

Assuredly the railroad was originally conceived, constructed and operated as a private commercial, profit-making enterprise. We submit it has preponderantly retained that character to the present day.

It has added to its commercial activities the operation of two hotels, a dairy farm, a commissary establishment (stores) and certain bus lines. With respect to at least the last named activity, it has been suggested that it was beyond the corporation's charter powers.

Panama R. R. Co. v. Bosse, 249 U. S. 41, 47.

In competition with privately owned ocean carriers, the corporation operates a fleet of steamships between New York and the Canal Zone, maintaining a complete staff of over one hundred employees at New York City. It solicits and accepts commercial freight and passenger business, carrying government freight and passenger business at reduced rates. Under the provisions of section 4 of the Intercoastal Shipping Act of 1933 (46 U. S. C. A. 846) private carriers were authorized to allow similar reduced rates. Its ships have also at some time operated to Haiti and South America, apparently having withdrawn from these services upon protest by competing privately owned carriers (R. 39).

We have carefully examined opposing counsel's brief for a citation to the effect that the operation of steamships, a railroad, stores, hotels or dairies could have any suggestion of a governmental function. Needless to say, we found none. Common sense compels the conclusion that such activities are intrinsically, traditionally and historically of a commercial and proprietary nature. And this is further reinforced when it is considered that the particular activities here in question have a background of fifty-five years of private, commercial operation.

It would seem that, if the operations of the Panama Rail Road Company can be justified as usual and traditional functions of government, the Federal government would be justified in taking over and operating, as tax-free enterprises, commercial steamship lines to Hawaii, Guam or any other island possession, commercial airlines to Alaska, or the railroads which serve any of the naval yards or military depots in the country.

Surely, such undertakings would be considered without the realm of usual or traditional functions of government; equally so, we believe, are the activities carried on by the Panama Rail Road Company.

Counsel urges that the operation of the Company's steamers is not primarily for the purpose of engaging in commercial competition with other steamship lines and intimates that the same is true of the other activities of the Company and that, therefore, immunity from State taxation must follow. But, in *South Carolina v. United States, supra,* and *Ohio v. Helvering, supra,* the State did not engage in the liquor business primarily for profit, but rather as a regulatory means; and in *Helvering v. Powers, supra,* the State did not go in the street railway business primarily for profit but solely, as a temporary expedient, for the public welfare. Yet because the particular undertaking was a business enterprise and a departure from usual governmental functions, Federal tax immunity was denied. For the same reason, we submit, immunity from State taxation was properly denied here.

The approach of Courts familiar with Canal Zone affairs further supports our argument. The company has been treated as an ordinary private corporation in suits brought against it. Thus, in *Panama Railroad Co. v. Bosse,* 239 Fed. 303, affirmed 249 U. S. 41, in stating the facts of the case, the Court said:

> "The plaintiff in error, a corporation organized under the laws of the State of New York, was operating motorbusses between the town of Balboa and the city of Panama in the month of July, 1916 * * *."

And in *Panama Railroad Co. v. Curran,* 256 Fed. 768, the Circuit Court of Appeals emphasized the private, non-governmental character of the Company. The Court said, page 772:

> "Departmental regulations and rulings indicate that it has been recognized that a purpose of preserving the corporate existence and organization was to make inapplicable to Panama Railroad receipts provisions requiring payment into the treasury of receipts by governmental agents. Whatever the purpose was, such legislation as that which has been mentioned shows that the lawmakers intended the relation between the government and the defendant to be that of a stockholder to the corporation which issued the stock, *and not that of principal and agent.* This being true, the following statements made in the opinion of Chief Justice Marshall, in the case of *Bank of the United States v. Planters' Bank,* 9 Wheat 904, 6 L. Ed. 244, are applicable to the facts of the instant case:
>
> 'The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the state holds an interest in it. *It is we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.* Thus many states of this Union who have an interest in banks are not suitable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its

> sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.'
>
> From the fact that one owns all the stock of a private corporation it does not follow that the acts of the corporation are to be treated, not as its acts, but as the acts of its sole stockholder. *Pullman Palace Car. Co. v. Missouri Pacific R. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Salas v. United States*, 234 Fed. 842, 148 C. C. A. 440. The defendant was not, on the ground mentioned, exempt from the liability asserted against it." (Italics ours.)

The liability of the Company to suit, as any other railroad company, and its property to seizure, is not affected by the fact that the United States is sole stockholder.

Panama R. Co. v. Minnix, 282 Fed. 47.

Whether the acts of certain individuals to defraud the Panama Railroad Company could constitute a conspiracy to defraud the United States was considered in *Salas v. United States*, 234 Fed. 842. The Court held that the combination proved did not defraud or intend to defraud the United States.

The Court said, page 844:

> "The theory of the United States is that the Panama Railroad Company is a governmental department, and Burke, though on the payroll of and paid by that company, was an officer of the United States. The trial judge so held as matter of law.

> The Isthmian Canal Commission was an agency of the United States under the supervision of the War Department, having complete control of the building of the canal. The United States was also the owner of the whole capital stock of the railroad company, absolutely dominating it and solely interested in its profits or losses. The government, however, continued the original corporate organization of the railroad company for its own purposes, among others to avoid the restrictions of certain laws of the United States applicable to the Commission. Accordingly there was created a department called the 'subsistence department' composed of the labor, quarters, and subsistence department of the Commission which furnished all food supplies to the employees on the Isthmus and the commissary department of the Panama Railroad Company, which bought, carried, and furnished all other merchandise and supplies. Burke was the manager of the latter. *When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation.*" (Italics ours.)

That Congress regards the property of the Panama Railroad Company as distinct from property of the United States and from property owned by other wholly owned corporations is manifested by the exception of the vessels of the Company from the Suits in Admiralty Act of March 9, 1920. Section 1 of that Act reads:

> "No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the

> United States or its possessions: *Provided, That this chapter shall not apply to the Panama Railroad Company.*" (Italics ours.) (Mar. 9, 1920, C. 95, §1, 41 Stat. 525, 46 U. S. C. A. 741.)

The United States Employees Compensation Act of September 7, 1916, was enacted to provide compensation for employees of the United States suffering injuries in the performance of their duties. The act provides:

> "The term 'employee' includes all civil employees of the United States and of the Panama Railroad Company." (Sept. 7, 1916, C. 458, §40; 39 Stat. 750; 5 U. S. C. A. 790.)

Commenting on this provision the Court said in *Panama R. Co. v. Minnix*, 282 Fed. 47, *supra*, at page 49:

> "The employees are recognized by the act itself as being those of that corporation. *It took an express provision of the Compensation Act to extend its benefits to them.*" (Italics ours.)

Section 41 of the Act (5 U. S. C. A. 791) requires that no compensation shall be paid an employee of the Panama Railroad Company for injuries or death under circumstances creating legal liability in the Company to pay damages therefor until the employee releases any claim for such liability or assigns his claim to the United States.

Opposing counsel refers (p. 9 Brief) to the Federal Act of March 2, 1931, providing for a compensation and retirement system (48 U. S. C. A. 1371 *et seq.*). We fail to see the relevancy of that act here since, by its terms, it applies only to "employees of the Panama Railroad

Company, *on the Isthmus of Panama*, * * *." Appellant is not comprehended under the act since he is not an employee "on the Isthmus of Panama".

It may be pertinent to add that the various hearings held on the bill, which became the Act just referred to, indicate that there was considerable doubt as to the legality of imposing a retirement plan "on people who are not employees of the Government", but the fact that both Canal employees and Company employees were subject to the same unhealthy climate and that both groups had been interchanged continually in the early days of the Canal's construction led to the creation of one retirement system for both. (Hearing before Committee on Interstate and Foreign Commerce of the House of Representatives held December 28, 1929; March 3, 6, 27, 1930.)

Counsel also refers to the Temporary Economy Act of 1932 (p. 9 Brief) and says that pursuant thereto the President of the United States, by order dated July 25, 1932, effected a monthly reduction in the monthly pay and salaries of the employees of the Company. The Act was, however, amended in 1933 (5 U. S. C. A. 673, note) by entirely excepting from the Act "officers and employees of the Panama Canal and Panama Railroad Company on the Isthmus of Panama" (§215 [5 U. S. C. A. 30a] as amended) and, with respect to the remaining officers and employees by directing that the proper parties in charge of the corporation "take such action as may be necessary to apply the provisions of this title to officers, positions, and employment under such corporation and to officers and employees thereof * * *." It seems necessarily to

follow that any reduction in compensation paid to officers or employees of the Panama Railroad Company must be effected by action of the board of directors of the Company.

In any event, counsel's reference to the several Acts of Congress enacted with respect to the Company have no particular relevancy here. They represent nothing further than the natural interest which any proprietor takes in an important and profitable commercial enterprise. We cannot appreciate where these references will, in any wise, aid this court in determining whether the Company engages in a usual or essential governmental function. Nor are the references to various rulings and conclusions of Federal officials and bureaus of more than incidental interest. It is, for example, interesting to note that one important Federal department, the U. S. Shipping Board, charged with the responsibility of developing an American Merchant Marine generally, urged that the steamship services of the Panama Railroad Company be abandoned, presumably because of the unfair competition of this government-owned service with existing privately-owned ocean carriers.

Counsel suggests (pp. 25-26 of Brief) the existence of a double standard whereby the functions and activities of the Federal government, with respect to immunity from State taxation, must be considered on an entirely different basis than similar functions and activities of a State where immunity from Federal taxation is in question. It is said that a State may legally engage in a proprietary undertaking, whereas the Federal government may not, except it proceed "*ultra*

vires and without warrant of law" and that such latter conclusion may not be indulged.

We submit that this argument is without merit and runs counter to views long held and repeatedly announced by this Court to the effect that, because of the dual form of our government, the immunity from State taxation enjoyed by the usual governmental functions of the Federal government and the corresponding immunity of similar State functions from Federal taxation, are reciprocal and complementary. There is no basis or authority in law for considering one or the other by a different standard.

Collector v. Day, 11 Wall 113, 127, *supra;*
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 584;
Ambrosini v. United States, 187 U. S. 1, 7;
Indian Motocycle Co. v. United States, 283 U. S. 570, 579;
Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 400;
Trinity Farm Const. Co. v. Grosjean, 291 U. S. 466, 471;
United States v. California, 297 U. S. 175, *supra.*

We believe we have demonstrated that the Panama Railroad Company is a government-controlled corporate agency engaged in a commercial proprietary function. We urge that this case should be decided upon the principles laid down in the state liquor dispensary cases, *South Carolina v. United States, supra,* and *Ohio v. Helvering, supra,* and the Boston Elevated case, *Helvering v. Powers, supra.* Assuredly, the own-

ership and operation of stores, hotels and dairies is akin to the operation of liquor stores; and the operation of a steamship line and a railroad comparable to the operation of a street railway. *And this particularly where such operation is in continuation and expansion of earlier private commercial operation.* The commercial nature of the functions of the Panama Railroad Company are further marked by the fact that its operations are profitable and yield dividends to its stockholder, the United States.

These operations constitute an activity to which, unquestionably, the taxing power of the State normally would extend. Under the decision in *Helvering v. Powers, supra,* the Federal government cannot withdraw sources of revenues from a State by engaging in a business which constitutes a departure from usual governmental functions and to which the State's taxing power would normally extend.

Upon the subjection of the Panama Railroad Company to State taxation, see *People ex rel. Western U. Tel. Co. v. Roberts,* 30 App. Div. 78, wherein the Court said:

> "The Panama Railroad Company is a domestic corporation, organized in 1849, and is subject to the franchise tax imposed by chapter 542 of the laws of 1880, and the acts amendatory thereof or supplemental thereto. Under these laws, prior to 1889, *the company had been assessed and had paid into the state treasury a large amount of taxes.*" (Italics ours.)

In *Commissioner v. Ten Eyck, supra,* the government sought to tax the salary of the Chairman of the Albany Port District Commission, a public corporation *ex-*

pressly formed to construct and maintain, *not for profit*, port, harbor and terminal facilities as a link in the waterway development from the Atlantic to the Great Lakes. Very plainly such a tax would burden and impede an essential and usual governmental function of the State.

Here, an entirely different situation prevails. Paraphrasing the words of the Court in the *Ten Eyck* case, it may be said that here the government has not only "supplanted" but has acquired and continued a "private business to which the state taxing power would normally extend". Taxing appellant's salary could not burden, hinder or embarrass the government of the United States for the simple and sufficient reason that the United States does not pay him his salary, either directly or even remotely. His salary is paid from the profitable operations of the corporation which after payment of all salaries and charges, yield the United States cash dividends. As was held in Wilcuts v. Bunn, 282 U. S. 216, immunity from taxation cannot exist where the taxation is not a direct burden laid upon a governmental instrumentality and where there is only a remote, if any, influence upon the exercise of the functions of government.

III.

CONCLUSION

The position of the State of New York.

We feel that it is desirable, in view of the vital implications of the instant case, that the State of New

York make its position clear, in respect of this and other cases involving a similar question, some of which may very well come before this Court for final determination. As we have indicated, there have been several, the *Ten Eyck, Harlan* and *Sherman* cases, *supra,* where the determination was adverse to the Government and no appeal to this Court was taken. Nevertheless, the government denies the authority of those cases as determinative of the question.

Cases now pending seem to us to involve efforts to subject to Federal taxation, functions that long have been accepted as usually and traditionally the province of the State or its municipal corporations. Thus, in *Case v. Commissioner, supra,* the government is seeking to subject to Federal tax the activities of the Port of New York Authority, and in *Brush v. Commissioner, supra,* the function of supplying New York City with water is sought to be taxed by the government.

The State of New York has opposed and intends to oppose the government's contentions in those cases. In so doing, it believes its position in the instant case to be entirely justifiable and consistent. In those activities of the State and its public corporations, agencies and political subdivisions, which are and have been of a characteristic, usual and traditional governmental character, the State intends to press for a determination favorable to their immunity from Federal taxation.

We have no desire to enlarge the scope of *Helvering v. Powers, supra,* but rather to hew close to the principles there laid down by this Court. It is because of

the proponderantly commercial character of the activities of the Panama Rail Road Company that we press the reasonableness of the State's position in the instant case.

If this Court should conclude that those corporate functions and activities are essential to and usually associated with the operation of a canal or the national defense, the State must concede immunity from taxation. Such, we submit however, is not the case.

The mutual and complementary immunity from taxation of State and Federal instrumentalities of government is implicit in our constitutional form of government and is founded in the doctrine that power to tax is power to destroy (*McCulloch v. Maryland, supra,* 4 Wheat. 316, 427). Such immunity necessarily conflicts, to a certain extent, with what Mr. Chief Justice Marshall, in the same case (p. 425) termed the vitally important power of taxation that was retained by the States; and which was characterized by Mr. Justice Stone in *Lawrence v. State Tax Commission,* 286 U. S. 276, 279, as the "unilateral action of the state government in the *exercise of the most plenary of sovereign powers,* that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits." (Italics ours.)

It seems apparent that the principle of immunity, interfering as it does with the exercise of a vitally important, plenary sovereign power, ought only to be invoked and employed when there is a direct and imminent hindrance to, or restraint upon, functions which are unquestionably properly and usually governmental in their character.

Otherwise, little will remain beyond an ever dwindling semblance of state sovereignty, if immunity from State taxation is sought and allowed in the case of all of the constantly broadening activities of the Federal government. It may very well be proper and desirable that the United States own and operate the Panama Rail Road Company. But when the government engages in commercial, proprietary activities, acting through a corporate agency, the officers and employees of such a corporation do not have the status, for tax purposes, of officers and employees of the United States engaged in usual and traditional governmental functions.

It is respectfully submitted that the determination of the State Tax Commission assessing a tax upon appellant in the form of a non-discriminatory excise, measured by his net income, including income received as salary paid him by the Panama Rail Road Company, should be upheld.

The order and judgment of the Supreme Court of the State of New York should be affirmed.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
Attorney for Appellees.

JOSEPH M. MESNIG,
Assistant Attorney-General,

HENRY EPSTEIN,
Solicitor General,
Counsel for Appellees.

P. 5.

SUPREME COURT OF THE UNITED STATES.

No. 139.—October Term, 1936.

The People of the State of New York, upon the Relation of Richard Reid Rogers, Appellant, *vs.* Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners, Constituting the State Tax Commission of the State of New York.	Appeal from the Supreme Court of the State of New York.

[January 4, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

The relator, Richard Reid Rogers, is general counsel for the Panama Rail Road Company, a corporation created by an old statute of the State of New York for the purpose of constructing and operating a railroad across the Isthmus of Panama. In making his state income-tax return for the years 1927, 1928, and 1929, he reported the receipt of salary from the corporation during those years, but, upon the claim that the salary was exempt, paid no tax. The State Tax Commission, however, sustained the tax, and it then was paid under protest. The Appellate Division of the Supreme Court of New York, to which the case was taken by certiorari, upheld the view of the Tax Commission, 245 App. Div. 452; and the decision was affirmed by the Court of Appeals, without opinion. 271 N. Y. 543.

The ground upon which the relator claimed the exemption was that the Panama Rail Road Company was a wholly-owned instrumentality of the United States, engaged in maintaining, operating and protecting the Panama Canal; that as such, the railroad company was exempt from state taxation and, in consequence, the fixed salaries paid to its officers and employees were also exempt. The Appellate Division held that the railroad company was a government-controlled corporate agency engaged in a commercial proprietary function, and was not immune from state taxation since, it said, such taxation did not hinder or restrain "functions

which are unquestionably, properly and usually governmental in their character."

First. The corporation was privately owned and operated for many years; but in 1904, the United States acquired the entire capital stock of the corporation, and ever since has been, and now is, the sole owner thereof. The company operates a railroad across the Isthmus, conducts a commissary establishment for the benefit of the personnel of the Panama Canal, the railroad company, and the armed forces of the United States upon the Isthmus, and operates a dairy and two hotels in connection therewith. It also operates a line of steamships between New York and the Canal Zone, which ships afford the personnel of the canal and of the railroad company transportation at a nominal rate, and carry freight for the government of the United States to the Canal Zone at 25% less than the customary tariff rates.

The acquisition by the United States of the Panama Rail Road Company was coincident with its acquisition of the control of the Panama Canal Zone and the right to construct and maintain a ship canal across it. Since the acquisition of the railroad company by the government, the directors, thirteen in number, have been elected by the Secretary of War, as sole stockholder of record of the corporate stock with the exception of thirteen qualifying shares held by the directors.

During the construction of the canal, the railroad was almost exclusively employed as an adjunct of such construction, although it was incidentally used also for commercial transportation across the Isthmus. In *United States ex rel. Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 6, we said, "For many years before the War, the Government had employed the Panama Railroad Company as its instrumentality in connection with the Canal." In a footnote following that statement, we pointed out that the stock in the railroad company was acquired in order that the railroad might be used in the manner most helpful to the government in constructing the canal, and cited public documents which sustained that view.

In order to reach a correct determination of the question whether the railroad company is exercising functions of a governmental character, the railroad and ships are to be considered not as things apart, but in their relation to the Panama Canal; and it is clear that the railroad and ships, after the completion of the canal, con-

tinued to be used chiefly as adjuncts to its management and operation. The question, therefore, to be answered is whether the canal is such an instrumentality of the federal government as to be immune from state taxation; and, if so, are the operations of the railroad company so connected with the canal as to confer upon the company a like immunity?

The authority for the construction of the canal and the acquisition of rights in connection therewith is found in the Act of Congress of June 28, 1902, c. 1302, 32 Stat. 481. By that act, the President was authorized to acquire for the United States all the rights and property of the New Panama Canal Company, of France, on the Isthmus of Panama, including the capital stock of the Panama Rail Road Company "owned by or held for the use of said canal company"; to acquire from the Republic of Colombia perpetual control of the Panama Canal Zone, a strip of land six miles in width and extending across the Isthmus; and to construct and perpetually maintain, operate, and protect thereon a ship canal, including "the right to perpetually maintain and operate the Panama Railroad." The acquisition was to include jurisdiction over the Zone and the ports at the ends thereof, and the power to make police and sanitary rules and regulations necessary to preserve order and preserve the public health thereon; and to establish judicial tribunals necessary to enforce such rules and regulations.

Section 7 of the act created a commission to carry out the purposes of the act, and authorized the employment of engineers necessary for the prosecution of the work. The commission was to be subject to the direction and control of the President, and was to make full reports of their doings, to be transmitted to Congress by the President. Section 8 authorized the Secretary of the Treasury to borrow, on the credit of the United States, such sums as might be required to defray expenditures authorized by the act, not to exceed $130,000,000, and to issue bonds of the United States as security therefor.

The Act of August 24, 1912, c. 390, § 4, 37 Stat. 560, 561; 48 U. S. C. §1305, authorized the President to govern and operate the Panama Canal and the Canal Zone through a Governor of the "Panama Canal" and other persons. The Governor was to be appointed by and with the advice and consent of the Senate, commis-

sioned for a term of four years, with an annual salary of $10,000. The Governor was to have control and jurisdiction over the Zone, which was to be held, treated and governed as an adjunct of the canal. 37 Stat. 564, §7; 48 U. S. C. §1307. Later legislation authorizes the President to make rules and regulations in matters of health, etc., and imposes penalties for their violation. 48 U. S. C. § 1310. The President is also given broad powers of police within the zone. 48 U. S. C. §§ 1312, 1313, 1314. We need not particularize further. Chapter 6, Title 48 U. S. C., discloses a large body of laws passed by Congress for the government and control of the canal, and of both the Canal Zone and the railroad company as necessary adjuncts of the canal.

That under these laws, the creation, management and operation of the canal are all governmental functions and the laws well within the constitutional power of Congress to provide for the national defense and to regulate commerce under the commerce clause of the Constitution, does not admit of doubt. *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 39; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525.

The building and operation of a bridge or a road or a canal is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium by and through which commerce is regulated, since such creation and use condition and facilitate transportation. *Luxton* v. *North River Bridge Co., supra,* pp. 533-534; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9, 10; cf. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 297. In recognition of the principle established by these and other decisions, this court in *Wilson* v. *Shaw*, 204 U. S. 24, 33, sustained the acquisition, construction and maintenance of the canal as within the commerce power of the federal government.

Such being the status of the canal, it requires no argument to demonstrate that all auxiliaries primarily designed and used to aid in its management and operation, and which have that effect, partake of its nature and are themselves cooperating regulators—or, perhaps more accurately speaking, constitute, with the canal, a single great regulator—of national and international commerce. And this, we think, is the effect of the interrelation of the railroad company's activities with the management and operation of the canal.

If support for this view were thought necessary, it could be found in the contemporaneous and long-continued administrative practice. On April 27, 1928, the Secetary of War, in a letter to the President, said: "The [steamship] Line is an integral part of the Panama Canal and indispensable in its discharge of its normal responsibilities. The successful operation of this great enterprise, which is of vital importance to the United States, demands absolute security as to its line of supply to this country."

Sec. 500 of the War Revenue Act of 1917 (40 Stat. 314), levied a tax upon sums paid for transportation by rail and water, but exempted (§ 502) therefrom payments received for services rendered to the United States, etc. The Commissioner of Internal Revenue held that transportation services performed for the Panama Rail Road Company fell within the exemption, on the ground that they were "in substance payments for services rendered the United States."

Art. 96, Department Regulations No. 49, revision of June, 1921, declares that transportation services rendered to agencies of the United States are exempt from the tax, and enumerates as among such agencies the Panama Rail Road Company. The commissioner had likewise held that the railroad company was not subject to the capital stock tax imposed by the Revenue Act of 1918 (40 Stat. 1126), because the company was a government agency. Again, on September 20, 1926, the Commissioner of Internal Revenue advised the company that inasmuch as it was a governmental agency, it was not required to file federal income-tax returns or to pay federal income taxes. No act of Congress suggests any different view, but all such legislation, so far as it deals with the subject, recognizes its correctness.

We attach no importance to the fact that the railroad company has utilized both its ships and railroad to carry private freight and passengers. The record shows that this is done to a limited extent compared with the government business; and that it is only incidental to the governmental operations. The primary purpose of the enterprise being legitimately governmental, its incidental use for private purposes affords no ground for objection. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 333. The first of these two cases dealt with the disposition of excess water power devel-

oped by a project to improve navigation; and the second with the disposition of surplus electric energy developed by a like project. But the principle is equally applicable to the situation here.

It is suggested that the dairy, hotels, and other enterprises, built and maintained by the company, are not governmental instrumentalities. Even if we accept that conclusion—which, in view of their use for the personnel of the railroad and canal, we are far from doing—it would not alter the fact that the railroad itself, in connection with the canal, is a federal instrumentality.

Second. The power of the federal government to use a corporation as a means to carry into effect the substantive powers granted by the Constitution has never been doubted since *McCulloch* v. *Maryland,* 4 Wheat. 316. The Panama Rail Road Company was acquired and has been utilized in virtue of that power. The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune.

In *Dobbins* v. *The Commissioners of Erie County,* 16 Pet. 435, 448-449, this court held that a state was without authority to tax the instruments, or compensation of persons, which the United States may use and employ as necessary and proper means to execute its sovereign power. The rule is well established; and the reasons upon which it is based and the authorities sustaining it have been so recently reviewed by this Court, *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575 *et seq.,* that further discussion is unnecessary.

The rule itself is not denied; but it was suggested in the court below by counsel for the state, and the suggestion was repeated here, albeit faintly, that the record does not establish whether relator was an officer or employee of the railroad company or an independent contractor. The point was not made or suggested either before the State Tax Commission or in the Appellate Division of the Supreme Court. The whole question there was whether the company was subject to taxation; and it quite evidently was taken for granted that a negative answer to that question would carry with it an exemption of relator's salary. It is conceded that the point was raised by counsel for the state for the first time in the Court of Appeals; and that in reply to a question from that bench whether he wished the case decided upon that point, counsel answered in the

negative and declared that the state wanted a decision upon the merits.

Under these circumstances, it is not surprising that the obligation of the relator to prove his case in this regard was somewhat perfunctorily discharged. The record, however, does show that relator was, and had been ever since the year 1906, general counsel for the railroad company with a fixed annual salary, in the same category in respect of the railroad company as the secretary and treasurer. We think this evidence sufficiently negatives the belated suggestion that relator may have been an independent contractor and not an officer, within the rule stated and discussed in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524-526.

Reversed and remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.